To: the Public Records Subcommittee

From: Bert Robinson, chair

Re: Deliberative process privilege and the 6255 "balancing test" exemption

Some of this will be a recap, but since we've departed from this issue for a number of weeks, I think it might be worth it. In addition, I've done some calling around in the past few days to folks in SF and Milpitas, and have learned a few things about their experiences without 6255 that are worth sharing. At this point, I now see four broad options for us.

- 1.) We could leave the existing law (CPRA section 6255) as is.
- 2.) We could incorporate a variant of 6255 into the sunshine law, but add language that seeks to limit its use. I will discuss that possibility below.
- 3.) We could adopt language similar to the cities of Milpitas and San Francisco, which forbid using 6255 and/or the deliberative process privilege to withhold public records. In effect, these cities are saying they will withhold records only if that can be justified by a specific exemption in the ordinance (we haven't gotten to those exemptions yet, but that would be something like a litigation materials exemption).
- 4.) We could adopt the Milpitas-SF language, but look closely at San Jose's use of 6255 and other experience to see whether we can craft a set of narrower exemptions to help help protect specific, legitimate interests that now rely on 6255.

Discussion

In his presentation to the subcommittee and his recent memo, City Attorney Rick Doyle argues the importance of the 6255 exemption to city processes and city decision-making. Rick also says the city only uses these exemptions "in limited circumstances." Based on the Mercury News' experience, I would say the city has grown somewhat more judicious about using 6255, particularly under the new mayoral administration. Still, 6255 remains capable of broad interpretation. Ed Davis commented in a recent meeting that he worries a broad balancing test could undermine the Sunshine Law.

If we share that concern, there are two ways to approach it, short of just ditching 6255. One is to try to tweak the language to set a higher bar (option 2 above). I discussed this possibility with some government attorneys who have experience with the law, and they made several suggestions. The first would be to incorporate a "clear and convincing evidence" standard in the balancing test to raise the legal bar – the city must establish by clear and convincing evidence that the public interest in withholding the record outweighs the public interest in disclosure. A second suggestion is to require the city attorney to write a detailed justification each time the balancing test is used to withhold a record, and then allow that memo to be reviewed by the Open Government Commission if the requester chooses to appeal.

So that's one approach. The other approach (option 4 above) is to eliminate the balancing test as a concept, but to craft some specific exemptions that cover at least some of the circumstances in which it is used. Here are some exemptions that might be worth considering if we go this route:

- a.) **Personal information provided by private citizens.** This exemption would encompass situations where private individuals, through an interaction with the city, have provided personal information to the city with no expectation that the information would become public.
- b.) Identities of public employees who provide information in internal investigations. This is an issue that arose during the recent release of the investigation into Auditor Jerry Silva, where the names of employees who complained were redacted.
- c.) **Security/safety.** This exemption would allow the city to keep private information that might compromise public safety or security if released. San Francisco officials say they used 6255 in the past to protect this sort of information, and now struggle to find legal justification.
- d.) **Memos addressing closed meeting issues.** This exemption would make explicit what is implied in the Brown Act that material dealing with a closed session issue (a memo outlining the Mayor's goals for union negotiations, for example) can be withheld.

One issue I haven't listed here is deliberative process itself. Broadly protecting information that is part of the decision-making process of public employees is tricky, since the expectation of privacy is not the same as private individuals might have, and since there is clearly a strong public interest in the activities of government employees. Remember that the city used a variant of a 6255 argument in an effort to keep public employee salaries confidential. If we want to retain deliberative process as a justification for withholding records, it probably makes sense to keep some sort of balancing test in the ordinance, since it's hard to imagine how such an exemption could be narrowly crafted.

I'm going to attach to this memo a couple of responses I received to my inquiries in Milpitas and San Francisco about 6255. These responses suggest it is not difficult to live without a balancing test. However, I also talked to a couple of government officials who took the opposite view and defended 6255, but they asked me to keep their remarks in limited distribution, so I will report on them orally at our next meeting. In the meantime, consider this half the picture of the response I gathered.

Responses:

Matt Dorsey, public relations aide for the San Francisco city attorney. Matt is also the department's liaison to the city's Sunshine Task Force:

"The only time there's been any hand-wringing about the lack of a balancing test was when we started getting some requests for information about the city's security and disaster plans in the wake of 9/11. People were asking for some specifics about security

plans and contingencies and the money we were spending, and it's not the sort of thing you would want a terrorist to get his hands on. We finally found a narrower exemption that worked. However, after Katrina, I think some of us came to the conclusion that a little public scrutiny of disaster planning is a good idea. So I think in the end it wasn't much of a problem."

Bob Livengood, Milpitas city councilman:

The balancing test you refer to, is in my opinion, a catch all phrase of sorts that grants local governments far too much leeway in their ability to withold vital information that should not be withheld from the public at any stage of the deliberative process. The arguments made by many local officials, especially city attorneys, that a significant amount of information should be withheld because of public interest lacks credibility. I have not seen in my 32 years of public service very much information that would rise to that level of confidentiality.

The "free flow of ideas and frank discussion of policy matters" as described by San Jose's City Attorney are de-legitimized when kept out of the public view. For me, the bottom line is simple: the public's business should be conducted within the eye and earshot of the public.

Milpitas' Open Government Ordinance is in my opinion, very good public policy. The scare tactics used by some open government opponents (one of whom suffered a stinging defeat at the polls, becoming in 2004 the first incumbent councilperson in 25 years to lose their seat) have proven to be just that, scare tactics. Our staff has not been overburdened with work (some opponents argued that staff would be inundated with requests to copy documents, etc), the city has not suffered any legal setbacks and the public has a venue to grieve staff decisions short of hiring an attorney (the open government sub committee).